IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 53 OF 2010

(CORAM: OTHMAN, C.J., MBAROUK, J.A., And BWANA, J.A.)

JULIUS JOHN SHABANI .....APPELLANT
VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Mipawa, J.)

dated the 16th day of September, 2009

in

Criminal Appeal No 26 of 2008

JUDGMENT OF THE COURT

15th & 22nd June, 2012

MBAROUK, J.A:

The appellant, Julius John Shabani was in Nachingwea District Court Criminal Case No. 48 of 2000 charged with the offence of rape contrary to **section 130 (2) (e) of the Penal Code**, Cap. 16 of the Laws as amended by the Sexual Offences Special Provisions Act No.

4 of 1998. The trial District Court convicted the appellant and sentenced him to a mandatory minimum sentence of thirty (30) years imprisonment and twelve (12) strokes corporal punishment. He was also ordered to pay Tshs. 100,000/= as compensation to the victim. Aggrieved, the appellant unsuccessfully lodged Criminal Appeal No. 26 of 2008 in the High Court of Tanzania at Mtwara before Mipawa, J. Dissatisfied, he has preferred this appeal.

The brief facts of the case are based on the events which occurred on 5-3-2000 at 08:00 a. m. when Edna d/o Galus (PW2) was in the court yard of her residence. The appellant came and asked PW2 the whereabouts of her husband. After PW2 told the appellant that her husband was not around, the appellant left and PW2 went to a nearby garden to pick some green vegetables. Thereafter, the appellant returned again jumped on PW2 and fell her down. PW2 fell on her back with a child. She resisted and raised an alarm where Zainabu d/o Issa (PW3) her sister in law and a neighbour came.

By the time PW3 came, she saw the appellant in the process of sexually intercoursing PW2. PW2 testified that, as she had no underwear, the appellant inserted his penis into her vagina. PW2 set free herself and the appellant managed to run away. She reported the matter to Village Executive Officer and later at 7:00 p.m. the appellant was arrested by militia men and sent to Lionja Police Station. PW2 was then given PF3 and went to Lionja Government Dispensary next morning on 6-3-2000.

When he was offered his right to defend himself, the appellant opted to remain silent. However, he called two witnesses to testify. Hamisi Selemani Lendapi (DW1), the appellant's brother testified to the effect that on 5-3-2000 he heard the appellant saying that he wanted to have sexual intercourse with a wife of another person. After a short while, the appellant came and DW1 asked him whether he has fulfilled his desire of raping somebody's wife. DW1 said the appellant answered in the negative. On the other hand, Juma Rashidi Lioma, the Village Executive Officer testified to the effect that, he ordered the arrest of the appellant who denied to have

raped PW2, but he agreed that they struggled and pushed each other only.

Before us, the appellant filed a memorandum of appeal containing the following grounds of appeal:-

1. That, he was wrongly charged.
2. That, the trial magistrate and the High Court Judge erred in law and in fact by putting reliance on the evidence of PW3 Zainabu Issa without considering her demeanour.
3. That, the trial magistrate and the High Court Judge erred in law and fact by convicting the appellant without giving him an opportunity to defend himself.
4. That, the trial magistrate erred in law and fact for non-compliance with the requirements of **section 240(3) of the Criminal Procedure Act**.
5. That, the evidence of PW3 was not corroborated by a sketch map of the scene of crime.

6. That, the prosecution failed to produce the clothes worn by the appellant at the scene of crime.

In this appeal, the appellant appeared in person unrepresented. Whereas Mr. Peter Ndjike assisted by Mr. Paul Kimweri, learned Senior State Attorney and State Attorney respectively, represented the respondent/Republic.

At the hearing, the appellant had nothing useful to submit apart from what he has stated in his grounds of appeal, understandably so being a lay person.

On his part, Mr. Kimweri started his submission by contending that the evidence adduced by PW2 (the victim) was very much clear to prove the offence of rape. In support of his submission, he cited to us the decision of this Court in the case of **Selemani Makumba V. The Republic**, Criminal Appeal No. 94 of 1999 (unreported) where it was stated that:

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration."

Apart from that, Mr. Kimweri submitted that the evidence of PW2 was corroborated by the evidence of PW3 who saw the appellant committing the offence of rape to PW2. All in all, Mr. Kimweri submitted that the evidence was watertight.

In his reply to the grounds of appeal, Mr. Kimweri conceded to the first ground of appeal to the effect that it was not proper for the appellant to be charged with the offence of rape under **section 130 (2) (e)** as the victim was not under eighteen years of age. He added that the proper provision which the appellant should have been charged with was **section 130 (2) (a)** and not **section 130 (2) (e).** However, Mr. Kimweri was of the firm view that the appellant was not prejudiced as in the particulars of the offence it

has been specifically stated that offence was that of rape to a woman (PW3) and not a victim who is under 18 years of age. Mr. Kimweri added that as the defect was not fatal, the same is curable under the provisions of **section 388 of the Criminal Procedure Act.**

We respectfully agree with Mr. Kimweri in his reply to the 1st ground of appeal to the effect that even if the appellant was wrongly charged under **section 130(2) (e)** as the victim was not under eighteen years. We also agree with him that the defect has not prejudiced the appellant as he well knew through the particulars of the offence that he is charged with the offence of raping a woman (Edina d/o Galus –PW2) who is well known to him as a fellow villager. Furthermore, let us examine **section 388 of the Criminal Procedure Act (CPA)** which states as follows:-

> *"... no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of irregularity in the complaint, summons, warrant, charge,*

proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that error, omission or irregularity has in fact occasioned a failure of justice ...."

In the instant case, we see no failure of justice occasioned to the appellant, hence we agree with Mr. Kimweri that the defect is not fatal and the same is curable under **section 388 of the CPA.**

As to the second ground of appeal, Mr. Kimweri submitted that it is a trial court which is in a better position to assess the demeanour and credibility of a witness. He said, this Court as a second appellate court cannot have a chance to assess the demeanour such of a witness. Hence, he urged us to find the second ground of appeal with no merit as PW3 Zainabu Issa adduced her evidence before the trial District Court which had all the time to assess her demeanour.

There is no doubt that, it was the trial District Court at Nachingwea which had ample time to assess the demeanour and credibility of PW3 Zainabu Issa.

We also are of the firm view just like Mr. Kimweri that the issue of a credibility and demeanour of a witness is always in the province of a trial court which is in a better place to assess the witness being face to face with him/her. The appellate court merely depend on the record of proceedings from the trial court. This Court in the case of **Ali Abdallah Rajab V. Saada Abdalla Rajab and Others (1994)** TLR 132 held that:-

> "(i) *where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion.*
>
> *(ii)* ***where the decision of a case is wholly based on the credibility of the witness***

then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record."

(Emphasis added).

Earlier on, in the case of **Omari Ahmed V. Republic** (1983) TLR 52 it was held that:-

"the trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a reassessment of their credibility".

In the instant case, the trial court found the evidence of PW3 credible. Hence, we cannot at this stage say otherwise, as there are no circumstances which force us to re-assess her demeanour and credibility. Furthermore, as Mr. Kimweri submitted, the appellant did not raise this ground at the High Court, hence we are of the considered opinion that it cannot be raised at this stage for the first

time. In this event, we find this second ground of appeal with no merit.

As to the third ground of appeal, Mr. Kimweri submitted that, it is not true that the appellant was not given his right to submit his defence. He said, the record clearly shows that, he himself opted to remain quiet, but allowed to call some of his witnesses to testify. Hence Mr. Kimweri urged us to find the third ground of appeal without merit.

As the record clearly shows, there is no doubt that the appellant was offered his right to defend himself in this case as the record shows, it was himself who opted to remain quiet. At page 14 of the record the proceedings shows as follows:-

> "**Order:-** *Prosecution case is closed and the accused person is found to have a case to answer is asked to elect how he would like to give his defence.*
>
> *Sgd. J.K.A. Khahiki, PDM*
>
> *30/08/2000*

ACCUSED PERSON: I elect to keep quiet.

My witnesses have not attended today.

I do not know if they got summons. I

still need them."

R. O.F. C

ORDER: *Defence hearing on 13-9-2000.*

Issue summonses. Accused further

remanded in custody.

Sgd. J.K.A. Khahiki, PDM

30/08/2000

That clearly shows that the appellant was offered his right to defend himself but he opted to remain quiet. Hence, we find this ground with no merit too.

As to the fourth ground of appeal, concerning the non-compliance with **section 240(3) of the CPA**, Mr. Kimweri conceded to the defect, but he submitted that, even if the evidence found in

PF3 (Exhibit P2) is discounted, the remaining evidence is sufficient to prove the offence against the appellant. After all, he added that in rape cases, PF3 is not the only piece of evidence to be considered. To support his argument, he cited to us the decision of this Court in the case of **Ally Mohamed Mkupa V. The Republic**, Criminal Appeal No. 2 of 2008 (unreported). Hence, he urged us to find that this ground of appeal has no merit.

We fully agree with Mr. Kimweri to the effect that even if **section 240(3) of the CPA** was not complied with in this case, there was other evidence which was sufficient enough to prove the case against the appellant. We also fully subscribe to the views of Mr. Kimweri that as there was other strong piece of evidence, even if the PF3 (Exhibit P2) is discounted, the remaining evidence was sufficient to prove the offence of rape against the appellant.

See, the case of **Ally Mohamed Mkupa** (*Supra*) where it was stated that:-

> *"It is true that PF3 (Exhibit P.1) would have supported the commission of the offence. But*

rape is not proved by medical evidence alone.

Some other evidence may also prove it."

Also see the case of **Shaban Ally V.R.,** Criminal Appeal No. 50 of 2001 (unreported).

For that reason, we find the fourth ground of appeal without merit.

As to the ground of appeal which claims that the evidence of PW3 was not corroborated by a sketch map of the alleged scene of crime, Mr. Kimweri urged us to find it with no merit as the sketch map is not relevant to establish the offence of rape.

We agree with Mr. Kimweri that in this case there is no relationship between the offence of rape and a sketch map of the scene of crime. In the instant case, the evidence of PW2 and PW3 sufficiently established that PW2 was raped by the appellant. Hence no need to have the further corroboration of a sketch map. We find the fifth ground of appeal with no merit.

In his reply to the sixth and last ground of appeal concerning the prosecution's failure to produce the appellant's dirty clothes, Mr. Kimweri was of the view that the production of clothes as an exhibit at the trial court was not relevant to prove rape. He said, the prosecution directed itself to prove the ingredients of the offence. Hence, he urged us to find that the sixth ground of appeal without merit.

Again, we agree with Mr. Kimweri that the production of the appellant's dirty clothes was not an important ingredient to be proved in the offence of rape. As pointed out by Mr. Kimweri, the prosecution rightly directed itself to prove the ingredients of the offence of rape against the appellant. This they succeeded. In the event, we find the sixth ground of appeal with no merit.

Having exhausted the examination and analysis of the appellant's grounds of appeal, we are of the considered opinion that, there is no reason to fault the two concurrent findings of the two courts below.

In the event, we find the appeal lacks merit, hence it is hereby dismissed.

DATED at **MTWARA** this day of 21st June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

MBUYA R. M.
DEPUTY REGISTRAR